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Gregory J. Boles

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ANTITRUST—ILLINOIS BRICK RULE REQUIRES DISMISSAL OF PRIVATE
ANTITRUST ACTION BY INDIRECT PURCHASERS DESPITE
ALLEGATION OF INJURY AS DIRECT TARGET OF
ANTICOMPETITIVE CONSPIRACY

Merican, Inc. v. Caterpillar Tractor Co. (1983)

Caterpillar Tractor Company, a large manufacturer of industrial and farm equipment,¹ utilizes a worldwide network of authorized Caterpillar dealers to promote, distribute, install, and service its retail products.² According to the Distribution Agreement in effect in 1978, Caterpillar sold electric generator sets³ to authorized dealers at a discount of 25%.⁴ Five percent, or one fifth of this discount, represented compensation for the dealer's obligation to provide free delivery, inspection and warranty services to purchasers of new generator sets.⁵ Under the Distribution Agreement, the selling dealer was required to return the five percent service fee to Caterpillar if the generator was moved or resold elsewhere and another dealer provided the bulk of these services.⁶ Caterpillar would then transfer the five percent service fee to the servicing dealer upon the filing of an appropriate claim for reimbursement.⁷ If no claim was made by a servicing dealer within one year of the sale, Caterpillar's practice was to return the fee to the selling dealer.⁸ If an authorized Caterpillar dealer sold generator sets to an

1. 1 STANDARD & POOR'S REGISTER OF CORPORATIONS, DIRECTORS AND EXECUTIVES 457 (1983).

2. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 960 (1983), *cert. denied*, 104 S. Ct. 1278 (1984).

3. A typical generator set consists of a diesel engine, a generator, a battery, a governor, and transfer switches. *Id.* at 960 n.1. "It is used to provide 'prime' power to buildings and clusters of buildings without access to central power sources and to provide 'standby' powers to hospitals, schools, or other buildings." *Id.*

4. *Id.* at 960. Each Distribution Agreement assigns a Caterpillar dealer an area of service responsibility. *Id.* The dealer agrees to maintain a place of business in that area, to market Caterpillar products there, and to service Caterpillar products which are used within his territory. *Id.* The Distribution Agreement requires each dealer "to provide, free of charge to the user, delivery, inspection, and warranty services with respect to all Caterpillar products that receive their 'initial substantial use' in that dealer's service territory, regardless of when, where, or by whom the product may have been sold." *Id.*

5. *Id.* This compensation was for the dealer's provision of these services on generators sold by the dealer and used within his territory. *Id.*

6. *Id.* If a generator set was sold in one dealer's territory and taken to another territory for the period of its "initial substantial use," the selling dealer was required to return the five percent service fee to Caterpillar. *Id.* In this event, the selling dealer received a 20% discount. *Id.*

7. *Id.* This practice was required by the Distribution Agreement. *Id.*

8. *Id.* The court did not indicate whether this practice was required under the Distribution Agreement. *Id.* Prior to 1978, many dealers transferred the service fee directly to the servicing dealers. *Id.* at 960 n.2. In July of 1978, Caterpillar insisted

independent marketer for resale outside the Caterpillar dealer's service territory, and the independent marketer provided full warranty service, no claim would be made for the service fee.⁹ Accordingly, an authorized Caterpillar dealer could offer generator sets to these independent marketers at reduced prices, knowing that Caterpillar would remit the service fee to its selling dealer after one year.¹⁰

In July of 1978, Caterpillar began to retain unclaimed service fees instead of returning them to the selling dealers.¹¹ In response, the authorized dealers offered the generator sets to independent marketers at a smaller discount.¹²

In the mid-70's, plaintiffs, a group of general trading companies,¹³ began purchasing Caterpillar generator sets in the United States for resale in the international market.¹⁴ Once the generators were resold abroad, plaintiffs provided all warranty services to the purchasers.¹⁵ In 1980, plaintiffs brought a private antitrust action under sections 4¹⁶ and 16¹⁷ of the Clayton Act,¹⁸ alleging that Caterpillar's policy of retaining unclaimed service fees was adopted in furtherance of a conspiracy between Caterpillar and its au-

that the dealers comply with the terms of the Agreement and remit the fees to Caterpillar. *Id.*

9. *Id.* at 960-61. If an authorized dealer sold to an independent marketer for resale outside the dealer's territory, the dealer would return 5% to Caterpillar. *Id.* No authorized dealers would provide warranty service or file claims for the fee with Caterpillar if the independent marketer provided full warranty service. *Id.*

10. *Id.*

11. *Id.* at 961. Caterpillar classified the unclaimed service fees as miscellaneous income. *Id.*

12. *Id.*

13. *Id.* at 961. Plaintiffs were engaged in the international marketing and servicing of numerous products. *Id.*

14. *Id.* The plaintiff trading companies purchased generator sets primarily from Ohio Machinery Company (OMCO), a Caterpillar-authorized dealer in Cleveland, Ohio. *Id.* Plaintiffs then resold the generators on the international market, in competition with Caterpillar-authorized dealers in Europe and the Middle East. *Id.*

15. *Id.*

16. 15 U.S.C. § 15 (1982). Section 4 of the Clayton Act provides a treble damage remedy for victims of antitrust violations:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

Id. For a discussion of the enactment and current application of § 4, see notes 29-32 and accompanying text *infra*.

17. 15 U.S.C. § 26 (1982). Section 16 of the Clayton Act provides, in pertinent part: "Any person, firm, corporation or association shall be entitled to sue and have *injunctive relief*. . . as against threatened loss or damage by a violation of the antitrust laws." *Id.* (emphasis added). For a discussion of the distinct policies supporting the § 4 and § 16 remedies, see notes 80-85 and accompanying text *infra*.

18. Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 15-27 (1982)).

thorized dealer in Saudi Arabia in violation of section 1 of the Sherman Act.¹⁹ The plaintiffs claimed that the conspiracy was designed "to allocate customers and territories for the sale of Caterpillar electric generator sets and to foreclose [the plaintiffs] and other generator set marketers from engaging in price competition with defendant's authorized dealers."²⁰

Caterpillar filed a motion to dismiss the section 4 claim, claiming that section 4 did not provide a remedy to persons who were not direct purchasers from an alleged antitrust violator.²¹ The district court denied the motion, holding that indirect purchasers could assert a treble damages action under section 4 when they were the direct targets of an unlawful conspiracy.²² The

19. 713 F.2d at 961 (citing Sherman Act, § 1, 15 U.S.C. § 1 (1982)). Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

Plaintiffs alleged that Caterpillar's motivation in changing its service fee policy was to eliminate plaintiffs' competition in selling generator sets in Saudi Arabia. 713 F.2d at 961. Plaintiffs characterized the new fee policy as placing an "automatic penalty" on dealers who sold generator sets for use outside their territory. *Id.*

20. 713 F.2d at 961 (quoting Complaint of Plaintiff at ¶ 21). Plaintiffs claimed to have lost sales, profits, and new business opportunities as a result of Caterpillar's actions. *Id.*

[Plaintiffs] also allege that prices of electric generator sets have been artificially stabilized and maintained, that competition in the sale of the generator sets has been substantially lessened or eliminated, that Caterpillar's authorized dealers have been prevented from distributing generator sets in territories and to customers of their choosing, and that purchasers of the generator sets have been deprived of the opportunity to purchase those products from suppliers of their own choice at competitive prices.

Id.

21. *Id.* at 962. Caterpillar argued in its motion to dismiss that suits by indirect purchasers alleging "passed-on" damages were precluded by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). 713 F.2d at 962 (citing *Illinois Brick*, 431 U.S. at 746). For a discussion of *Illinois Brick*, see notes 42-52 and accompanying text *infra*. For a discussion of "pass-on" theory, see note 33 and accompanying text *infra*. The defendant conceded that *Illinois Brick* would not bar the plaintiffs from seeking injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (1982). 713 F.2d at 962 n.6. For a discussion of *Illinois Brick*'s applicability to injunctive relief under the Clayton Act, see notes 80-85 and accompanying text *infra*.

22. 713 F.2d at 962. The district court did not perceive *Illinois Brick* as an absolute bar to suits by indirect purchasers under § 4, and felt that a later Supreme Court decision mandated a more flexible approach. *Id.* (citing Appellee's Brief at 4511 (citing *Blue Shield v. McCready*, 457 U.S. 465 (1982))). For a discussion of *Blue Shield*, see notes 86-93 and accompanying text *infra*.

After the district court denied the defendant's motion, it entered an amended order denying the motion and certifying a controlling question of law for immediate appeal. *Id.* (citing 28 U.S.C. § 1292(b) (1982)). The following question was certified by the district court:

When an alleged conspiracy between an electrical generator manufacturer and one of its authorized foreign dealers is formed to hinder and/or exclude intra-brand competition in the foreign market by an independent, non-factory authorized dealer who purchases from other authorized dealers for resale in the foreign market, whereby the manufacturer imposes a non-refundable "5% warranty service fee" on all sales by authorized dealers when the generators are to be installed for initial use outside of the author-

United States Court of Appeals for the Third Circuit²³ reversed, *holding* that, regardless of their claim that they were the targets of a conspiracy, indirect purchasers are not entitled to recover damages for antitrust injuries under section 4 of the Clayton Act. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1278 (1984).

Congress enacted the Sherman Antitrust Act of 1890²⁴ and the Clayton Act of 1914²⁵ in order to promote competition and inhibit monopolies and restraints upon freedom of trade.²⁶ The Sherman Act is a broad prohibition of anticompetitive practices²⁷ which Congress believed resulted in the enhancement of prices and inefficient allocation of resources.²⁸ Section 4 of the

ized selling dealer's assigned geographical service territory, is the "target-victim" of the conspiracy (the independent non-factory authorized dealer) precluded from maintaining a private damage action against the manufacturer under Section 4 of the Clayton Act (15 U.S.C. § 15) by operation of the rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L.Ed.2d 707 (1977)?

Id. at 962 n.7.

23. 713 F.2d at 960. The case was heard by Circuit Judges Hunter and Higginbotham and District Judge Gerry of the United States District Court for the District of New Jersey, sitting by designation. Judge Hunter wrote the majority opinion. Judge Higginbotham filed a dissenting opinion.

24. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

25. Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1982)).

26. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 1, at 14 (1977). Congress believed the Sherman Act was

required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).

27. *See* 15 U.S.C. §§ 1-2 (1982). Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C. § 1 (1982). For the pertinent text of § 1, see note 19 *supra*. Section 2 prohibits monopolization, attempts to monopolize, and combinations and conspiracies to monopolize. 15 U.S.C. § 2 (1982). For a general discussion of the Sherman Act, see L. SULLIVAN, *supra* note 26, §§ 49-52, 59, at 132-40, 152-55.

28. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). The Court noted that the fear of price enhancement and other wrongs

led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

Clayton Act (section 4) encourages the prosecution of antitrust actions by "private attorneys general"²⁹ by authorizing a treble damage remedy for "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."³⁰

Despite the very broad language of section 4, federal courts have recognized that Congress intended to limit the availability of relief under the section.³¹ The Supreme Court has attempted to define these limits in a manner which is consistent with the legislative purposes of the antitrust laws: compensating victims of anticompetitive conduct and depriving violators of their

Id. Eventually, the focus of the Sherman Act shifted from the control of price enhancement to the preservation of allocative efficiency. *See generally* L. SULLIVAN, *supra* note 26, § 1, at 1-2. For a discussion of the origin and purposes of the Sherman Act, *see generally* *Standard Oil Co. v. United States*, 221 U.S. at 49-62.

29. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). For a discussion of this case, *see* note 52 *infra*.

30. 15 U.S.C. § 15 (1982). The critical language of § 4 of the Clayton Act was originally enacted as § 7 of the Sherman Act. *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 103 S. Ct. 897, 904 (1983) (citing Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1914) (codified at 15 U.S.C. § 15 (1982))). The original provision, which permitted only recovery of the actual enhancement of price, was subsequently changed to provide treble damages in order to provide small consumers with an adequate incentive to bring suit. *See* 21 CONG. REC. 1765, 2455, 3145 (1890). For the pertinent text of § 4, *see* note 16 *supra*.

31. *See, e.g.*, *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970) (requirement in § 4 of the Clayton Act that suit be based on injuries which occur "by reason of" antitrust violations expressly restricts the right to sue under the section to plaintiffs who have been injured by an antitrust violation that was a "material cause" in the occurrence of damage), *cert. denied*, 401 U.S. 923 (1971); *Nationwide Auto Appraiser Serv. v. Association of Casualty & Sur. Co.*, 382 F.2d 925 (10th Cir. 1967) (the creation of a standing requirement of "direct" injury under § 4 of Clayton Act must be assumed to be in accord with congressional intent); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962) (plaintiff must prove that his injury was proximately caused by the alleged antitrust violation in order to recover under § 4 of the Clayton Act).

The Supreme Court has fashioned two types of limitations on the § 4 remedy. *See* *Blue Shield v. McCready*, 257 U.S. 465 (1982). The first type of limitation restricts the *classes of plaintiffs* who may recover treble damages for antitrust violations. *See* *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In *Hawaii v. Standard Oil Co.*, the Court ruled that § 4 did not permit a state to sue in its *parens patriae* capacity for damages to its general economy. 405 U.S. at 263-64. The Court created this limitation to avoid "the problem of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the state." *Id.* at 264. In *Illinois Brick*, the Court applied this same policy rationale to suits by indirect purchasers against antitrust violators. 431 U.S. at 736-48. For a discussion of *Blue Shield*, *see* notes 86-93 and accompanying text *infra*. For a discussion of *Hawaii v. Standard Oil Co.*, *see* note 52 *infra*. For a discussion of *Illinois Brick*, *see* notes 42-55 and accompanying text *infra*.

The second limitation on § 4 claims is the concept of antitrust standing. *See generally* L. SULLIVAN, *supra* note 26, § 147, at 770. This limitation involves the question "of which persons have sustained injuries too remote [from an antitrust violation] to give them standing to sue for damages under § 4." *Illinois Brick*, 431 U.S. at 746-48 (setting forth relevant analysis and comparing theory of antitrust standing to proximate cause in negligence).

illegal gains.³²

Private enforcement of the antitrust laws is complicated because the impact of anticompetitive practices such as overpricing is frequently "passed on" through the chain of distribution.³³ During the 1950's and 1960's, many defendants in price fixing and monopolization antitrust suits defended against section 4 claims by alleging that the plaintiffs had escaped injury by passing on illegal overcharges to their customers.³⁴ In *Hanover Shoe v. United Shoe Machinery Corp.*,³⁵ the Supreme Court rejected the "pass-on" defense, holding that a direct purchaser could recover for the entire overcharge, even if he had passed a portion of it down the vertical chain of distribution.³⁶ The Court reasoned that allowance of such a defense in treble damage ac-

32. *Pfizer, Inc. v. India*, 434 U.S. 308, 314 (1978) (citations omitted).

33. See Comment, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 311 (1978). Pass-on theory has been asserted offensively and defensively by antitrust litigants. See *id.* at 312. "Defendant sellers have argued that direct purchaser plaintiffs sustained no injury because they passed on overcharges to the next level in the chain of distribution" *Id.* See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (defensive pass-on theory). For a discussion of *Hanover Shoe*, see notes 35-39 and accompanying text *infra*. The offensive use of pass-on theory is illustrated in suits against remote sellers, where the plaintiff-indirect purchasers argue that middlemen have passed on overcharges to them. See Comment, *supra*, at 312. See also *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) (offensive pass-on theory). For a discussion of *Illinois Brick*, see notes 42-55 and accompanying text *infra*.

34. See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 490 n.8 (1968). The pass-on defense is predicated upon the assertion that the injury resulting from the anticompetitive behavior of the defendant was "passed on" down the vertical chain of distribution to a person other than the original purchaser. See Comment, *supra* note 33, at 311. Because the original purchaser increases the resale price to cover the illegal overcharge which he paid, the ultimate purchaser actually bears the impact of the defendant's overcharge. *Id.* The defense is most persuasive when the demand for the product is perfectly inelastic, and thus the product can be sold at an increased price with no effect on the quantity demanded. See generally P. SAMUELSON, *ECONOMICS* 357-61 (1980). However, real markets always demonstrate some sensitivity to price fluctuations. *Id.* at 361. If demand for a product is relatively insensitive to changes in price (i.e. price-inelastic), the original purchaser will be able to pass on a larger portion of the overcharge than when demand for the product is sensitive to changes in price (i.e. price-elastic). See R. POSNER, *ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 147-49 (1974).

Prior to the *Hanover Shoe* decision, the courts were split as to the viability of the pass-on defense. See *Hanover Shoe*, 392 U.S. at 490 n.8 (citing *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958) (defense available for products purchased for resale); *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir.) (defense available for overcharges for products used to produce plaintiff's goods), *cert. denied*, 350 U.S. 915 (1955); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.) (defense available where price-fixing concerns products purchased for resale), *cert. denied*, 314 U.S. 644 (1941); *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59 (S.D.N.Y.) (defense unavailable to utility overcharged for goods used to produce electricity for customers), *interloc. app. refused*, 337 F.2d 844 (2d Cir. 1964)).

35. 392 U.S. 481 (1968).

36. *Id.* at 491-94. *Hanover Shoe* involved a shoe manufacturer which brought a private antitrust damage action against a shoe machinery manufacturer. *Id.* at 483. The plaintiff argued that the defendant had monopolized the shoe machinery industry by offering its machines for leasing but not for sale. *Id.* at 483-84. The defendant

tions "would often require additional long and complicated proceedings involving massive evidence and complicated theories."³⁷ Furthermore, the Court noted that the goal of vigorous private enforcement of the antitrust laws would be impaired by leaving prosecution of these suits to the ultimate consumers of the product, who had "only a tiny stake in a lawsuit and little interest in attempting a class action."³⁸ The Court held that unless a special situation such as a cost-plus contract insulated the direct purchaser from harm, a defendant could not avoid liability by claiming that the damages were passed on.³⁹

Hanover Shoe did not resolve the question of whether pass-on theory could be used offensively.⁴⁰ That is, could one who had not purchased di-

attempted to avoid liability by claiming that the plaintiff had passed on the illegal overcharges to its purchasers. *Id.* at 491-92.

37. *Id.* at 493. The Court stated that

[a] wide range of factors influence a company's pricing policies [A] businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales.

Id.

The Court noted that even if these complex economic calculations could be made, the fact that the direct purchaser might have increased the price of the product to the full extent of the illegal overcharge did not indicate that he had been undamaged. *Id.* at 493 n.9 ("[t]he possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it"). Because the direct purchaser was always free to raise the price of the product and thus increase his profits on resale, the case would still be burdened with complex apportionment calculations, even when the plaintiff increased his selling price to the full extent of the overcharge. *Id.* at 493.

38. 392 U.S. at 494. The Third Circuit has echoed this sentiment: "[The prohibition of pass-on theory] is predicated in part on the perceived need to concentrate the recovery in direct purchasers from the defendants so that there be one group with an incentive to sue and enforce the antitrust laws." *Mid-West Paper Prods. Co. v. Continental Group*, 596 F.2d 573, 580 n.24 (3d Cir. 1979).

39. *Hanover Shoe*, 392 U.S. at 494. The *Hanover Shoe* Court indicated that there might be situations where the pass-on defense was valid. *Id.* The Court gave as an example the situation where "an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged." *Id.* Where both the cost and the profit are guaranteed to the plaintiff despite the overcharge, the defendant might be allowed to avoid liability. L. SULLIVAN, *supra* note 26, § 252, at 789 (citing *Hanover Shoe*, 392 U.S. at 494). For a discussion of the cost-plus contract exception in the context of the offensive use of pass-on theory, see notes 54-60 and accompanying text *infra*.

40. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977). Despite the *Hanover Shoe* prohibition of the pass-on defense, the circuits were split as to whether the offensive use of pass-on theory was authorized. *Id.* at 728 n.8. See *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971) (offensive use of pass-on theory precluded by *Hanover Shoe* discussion), *aff'd* *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970). But see *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973) (*Hanover Shoe* does not require dismissal of suits based on offensive use of pass-on theory), *cert. denied*, 415 U.S. 919 (1974).

rectly from the antitrust violator (an "indirect" purchaser) maintain a section 4 action by claiming that the intermediaries in the chain of distribution had passed on the defendant's illegal overcharge to it?⁴¹ This question was raised in *Illinois Brick v. Illinois*,⁴² where the state of Illinois and 700 governmental units sued a concrete block manufacturer, alleging a price fixing conspiracy in violation of section 1 of the Sherman Act.⁴³ The defendants had sold concrete blocks to masonry contractors, who incorporated the sales price in bids submitted to general contractors. The general contractors, in turn, submitted bids to the plaintiffs.⁴⁴ The Court determined that permitting the offensive use of pass-on theory would require overruling *Hanover Shoe*.⁴⁵ Asymmetrical application of pass-on, the Court reasoned, would present a serious risk of multiple liability for defendants.⁴⁶ Furthermore, the Court explained that the *Hanover Shoe* concern regarding litigative burdens was equally applicable in the context of the offensive use of pass-on theory.⁴⁷

41. See *Illinois Brick v. Illinois*, 431 U.S. 720, 726. In the period following *Hanover Shoe*, many courts, including the Third Circuit, rejected the offensive use of pass-on theory, reasoning that it involved the same problems of proof considered in *Hanover Shoe* in the defensive context. For a listing of cases adopting this position, see note 40 *supra*. But cf. *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322 (E.D. Pa. 1976) (where allegedly price-fixed product passes through various product markets in different forms, plaintiff should be barred from recovery due to difficulty in establishing causal connection between antitrust violation and price ultimately paid for product; but where allegedly price-fixed commodity reaches plaintiff in same form that it left hands of defendants, plaintiff should be given opportunity to present pass-on evidence). For a critical analysis of the *Mangano* approach, see Comment, *Mangano and Ultimate-Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394 (1972).

Other courts permitted the offensive use of pass-on theory despite the damage apportionment problems. See, e.g., *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973) (allowance of offensive use of pass-on theory furthers enforcement goal of § 4), *cert. denied*, 415 U.S. 919 (1974). Despite litigative complexities, these courts were willing to send pass-on issues to juries. See *id.* at 201 ("Facts raising reasonable inferences, based upon appropriate market data, should suffice to go to the jury on [pass-on] questions."); *In re Master Key Antitrust Litig.*, [1973-2] Trade Cas. ¶ 74,680, at 94,972 (D. Conn. 1973) ("[D]ifficulties of proof or apportionment of damages are not indubitably insurmountable and should await trial before being resolved.").

42. 431 U.S. 720 (1977).

43. *Id.* at 726-27. For the relevant portions of § 1 of the Sherman Act, see note 18 *supra*.

44. 431 U.S. at 726.

45. *Id.* at 736. For a discussion of why the court determined that permitting offensive use of pass-on theory would require overruling *Hanover Shoe*, see notes 46-48 and accompanying text *infra*.

46. *Id.* at 731 & n.11. The Court pointed out that the *Hanover Shoe* decision presumed that direct purchasers were entitled to full recovery. *Id.* at 730. See *Hanover Shoe*, 392 U.S. at 489. Therefore, the Court concluded that overlapping recoveries would result if indirect purchasers were permitted to sue on a pass-on theory. *Illinois Brick*, 431 U.S. at 730-31.

47. 431 U.S. at 731-32. The Court noted that *Hanover Shoe* was principally based upon "the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model,' . . . and of the costs to the judicial system and the efficient enforce-

Therefore, the Court concluded that any rule regarding this theory should apply equally to plaintiffs and defendants.⁴⁸

The Court then considered whether to abandon the rule of *Hanover Shoe* and allow both offensive and defensive assertion of pass-on theory.⁴⁹ The Court believed that an indirect purchaser-plaintiff's proof of damages would be based on speculative and complex economic theories which would unduly burden the efficient enforcement of the antitrust laws.⁵⁰ A related concern was that private enforcement of the antitrust laws would be undermined by diffusing recovery among many remote purchasers who would have little incentive to sue.⁵¹ The Court concluded that the use of pass-on theory was generally impermissible and denied recovery to the indirect purchasers.⁵²

ment of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Id.* (quoting *Hanover Shoe*, 392 U.S. at 493) (footnote omitted).

48. *Id.* at 730-32.

49. *Id.* at 736.

50. *Id.* at 741-43. The Court noted that as the *Hanover Shoe* Court observed, . . . "in the real economic world rather than an economist's hypothetical model," the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization.

Id. at 742 (quoting *Hanover Shoe*, 392 U.S. at 493) (footnote omitted).

The Court rejected the argument that the use of interpleader and compulsory joinder could help avoid the problems of duplicative recovery. *Id.* at 737-41. The Court stated that "even under the optimistic assumption that joinder of potential plaintiffs will deal satisfactorily with problems of multiple litigation and liability," allowing indirect purchasers to recover using pass-on theories "would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 740.

51. *Id.* at 745. The Court reasoned that apportionment of the recovery among plaintiffs up and down the distribution chain would not only increase the overall costs of recovery by injecting complex issues into the case, but would reduce the benefits to each plaintiff by dividing the recovery among a larger group. *Id.*

52. 431 U.S. at 746-48. Perhaps as important as *Hanover Shoe* in leading to the Supreme Court's decision in *Illinois Brick* is *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972). The case involved a treble damages action under § 4 brought by the State of Hawaii on its own behalf and as *parens patriae* for damages suffered by its citizens on account of certain alleged antitrust violations. *Id.* at 253. In concluding that such a damage action was improper, the Court considered three factors: the congressional intent to limit § 4 treble damage actions to a small group of plaintiffs; the risk of duplicative recovery if citizens filed additional suits in their individual capacities; and the litigative burdens in apportioning damages between the state and its citizens. *Id.* at 264.

Congress responded to this decision by passing the Hart-Scott-Rodino Antitrust Improvements Act, which states in pertinent part: "Any attorney general of a State may bring a civil action in the name of such State . . . on behalf of natural persons residing in such State . . . for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title." Hart-Scott-Rodino Antitrust Improvements Act, § 301, Pub. L. No. 94-435, 90 Stat. 1394 (1976) (codified as amended at 15 U.S.C. § 15c(a)(1) (1982)). The utility of this provision is

Noting that the policy concerns which prompted the rejection of passed-on damage claims were not implicated in all cases, the *Illinois Brick* Court suggested two exceptions to the general prohibition of offensive pass-on theory.⁵³ First, the Court indicated that when an indirect purchaser is committed to a fixed quantity cost-plus contract with its supplier, the indirect purchaser should be permitted to entertain a section 4 action against the remote seller based on an allegation of passed-on overcharges.⁵⁴ In this scenario, the plaintiff-indirect purchaser's proof of damages would not involve speculation regarding the extent to which the direct purchaser transferred its losses to the plaintiff.⁵⁵

Some courts of appeals have interpreted the cost-plus contract exception narrowly.⁵⁶ In *Mid-West Paper Products v. Continental Group*,⁵⁷ for example, the Third Circuit refused to extend the exception to informal cost-plus pricing arrangements.⁵⁸ By contrast, in *In re Beef Industry Antitrust Litiga-*

somewhat weakened by its legislative history, which reveals that the statute creates no new substantive liability and can be invoked only when the citizens of the state would have had individual causes of action. See H.R. REP. NO. 499, 94th Cong., 2d Sess. 6, 9, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2572, 2575, 2578. For a discussion of state *parens patriae* actions to enforce the antitrust laws, see Comment, *supra* note 33, at 325-27. For a general discussion of the legislative response to *Illinois Brick*, see Comment, *Congressional Authorization of Indirect Purchaser Treble Damage Claims: The Illinois Brick Wall Crumbles*, 47 FORDHAM L. REV. 1025 (1979).

53. See *Illinois Brick*, 431 U.S. at 735-36 & n.16.

54. *Id.* at 735-36. The Court noted that under such circumstances, "the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is buying a fixed quantity regardless of price." *Id.* at 736.

55. *Id.* The Court noted that where a cost-plus contract was involved, "[t]he effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." *Id.* In such circumstances, demand is inelastic with respect to price. See R. POSNER, *supra* note 34, at 147-49. The Court's approval of a cost-plus contract exception followed from the *Hanover Shoe* Court's adoption of such an exception in the defensive context. See *Illinois Brick*, 431 U.S. at 735-36 (citing *Hanover Shoe*, 392 U.S. at 494). The *Hanover Shoe* Court noted that where the plaintiff was committed to a preexisting cost-plus contract, the defendant could easily prove that the plaintiff was not damaged. *Hanover Shoe*, 392 U.S. at 494. The Court determined that under such circumstances, the policies supporting the prohibition of the pass-on defense were not applicable. *Id.*

56. See, e.g., *Zinser v. Continental Grain Co.*, 660 F.2d 754, 761 & n.10 (10th Cir. 1981) (cost-plus contract exception should be narrowly construed), *cert. denied*, 455 U.S. 941 (1982); *Jewish Hosp. Ass'n v. Stewart Mechanical Enters.*, 628 F.2d 971, 975-77 (6th Cir. 1980) (general contractor's contract with price-fixing subcontractor is not substantial equivalent of pre-existing cost-plus contract), *cert. denied*, 450 U.S. 966 (1981); *Phillips v. Crown Cent. Petroleum Corp.*, 602 F.2d 616, 633 (4th Cir. 1979) (finding no cost-plus equivalent where gasoline retailers were forced to vary their prices in relation to fixed wholesale prices), *cert. denied*, 444 U.S. 1074 (1980).

57. 596 F.2d 573 (3d Cir. 1979).

58. *Id.* at 579-80. In *Mid-West*, a wholesaler and a group of retailers sued five manufacturers of consumer bags for damages resulting from an alleged price fixing scheme. *Id.* at 575-76. One group of plaintiffs did not purchase bags directly from the defendant. *Id.* at 578. The plaintiffs argued, among other things, that the cost-plus contract exception "should be interpreted expansively so as to permit recovery"

tion,⁵⁹ the Fifth Circuit expanded the exception to allow offensive passed-on damage claims in circumstances which constitute the "functional equivalent" of the cost-plus contract situation.⁶⁰

Dicta in *Illinois Brick* has led to a second exception authorizing indirect purchasers to sue remote sellers who own or control their direct purchasers.⁶¹ Although one court has expansively interpreted "ownership or control,"⁶² other courts have confined the exception within narrow limits.⁶³ In *Mid-West*, the Third Circuit rendered a particularly strict reading of the exception, ruling that a parent corporation's relationship with its subsidiary is not sufficiently dominant to invoke the exception unless "the parent dominates

even if the contract did not fix the quantity of goods to be purchased. *Id.* at 57 n.9. Additionally, they claimed that the exception should include informal arrangements and patterns of cost-plus pricing. *Id.* The exception could not be stretched beyond the explicit limits laid down in *Illinois Brick*, the court noted, because the *Illinois Brick* Court "explicitly rejected any exception for 'cost based rules of thumb' and other informal arrangements." *Id.* at 577-78 n.9 (citing *Illinois Brick*, 431 U.S. at 743-44).

59. 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

60. *Id.* In *Beef Industry*, cattle producers sued supermarket chains for artificially depressing wholesale beef prices by agreeing not to pay more than a fixed price. *Id.* at 1153. The plaintiffs alleged that the chains could dictate the wholesale prices to meat packers because they wielded oligopoly power and because the packers, unlike the chains, had no long-range facilities to store beef and drive up its price. *Id.* at 1154. The processors' only recourse was to pass on the undercharge by reducing the price they would pay for cattle. *Id.* The plaintiff cattle producers were forced to sell at the depressed price because fattened cattle become less valuable if they are not sold within three weeks of the time they reach choice grade. *Id.* Thus, the packers had no incentive to absorb any of the chain's undercharge. *Id.* at 1164-65. Because the short-term inelastic price conditions of the beef market would make it easy to calculate the amount of any pass-on, the court concluded that "[t]he plaintiffs have alleged the functional equivalent of cost-plus contracts." *Id.*

61. See *Illinois Brick*, 431 U.S. at 736 n.16. The *Illinois Brick* Court actually referred to the ownership or control exception as a pass-on defense. See *id.* ("Another situation [in addition to the cost-plus contract context] in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer."). However, the cases cited by the Court in support of this proposition involved offensive pass-on theory. *Id.* (citing *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647-48 (1969) (parent-subsidiary relationship between seller and direct purchaser); *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973) (seller controlled direct purchaser by financial arrangements), *cert. denied*, 415 U.S. 919 (1974)). Accordingly, the lower courts have not limited this exception to the defensive context. See, e.g., *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 19 (3d Cir. 1978) (ownership or control exception applicable to offensive pass-on theory); *accord Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1102-03 (D. Md. 1979).

62. See, *In re Toilet Seat Antitrust Litig.*, 1977-2 Trade Cas. ¶ 61,604, at 72,496-97 (E.D. Mich. 1977) (independent purchasing agent who sold at prices dictated by seller for a fee unrelated to the number of goods sold is sufficiently controlled by seller to invoke the ownership control exception).

63. See, e.g., *Jewish Hosp. Ass'n v. Stewart Mechanical Enter.*, 628 F.2d 971 (6th Cir. 1980) (control exception "is limited to relationships involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchase that there has effectively been one sale"), *cert. denied*, 450 U.S. 966 (1981); *accord In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1162 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

and controls the subsidiary to such an extent that the subsidiary is deemed to be an agent of the parent."⁶⁴

Many courts are reluctant to bar the offensive use of pass-on theory in factual contexts which differ from that of *Illinois Brick*.⁶⁵ For example, in *Dart Drug v. Corning Glass Works*,⁶⁶ a federal district court held that *Illinois Brick* did not bar section 4 claims by indirect purchasers based on discriminatory conduct.⁶⁷ In *Dart Drug*, the plaintiff, an indirect purchaser of the

64. *Mid-West*, 596 F.2d at 589 (citing *P. F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 266-67 (6th Cir.), cert. denied, 400 U.S. 926 (1970)).

The *Mid-West* opinion seems difficult to reconcile with an earlier Third Circuit opinion. Compare *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1978) (rule of *Illinois Brick* cannot be evaded by simple expedient of inserting a subsidiary between the violators and the first noncontrolled purchaser) with *Mid-West*, 596 F.2d at 589 (only under certain circumstances, such as when the parent dominates and controls its subsidiary, will the parent and subsidiary be treated as one entity). The *Mid-West* court attempted to distinguish the *Sugar Industry* case by asserting that the *Mid-West* plaintiff could have sued the subsidiary if it participated in the price-fixing conspiracy. *Mid-West*, 596 F.2d at 589. Unfortunately, the court did not explain why the *Sugar Industry* plaintiff could not or should not have done the same thing. See *id.*

65. See, e.g., *Schwimmer v. Sony Corp. of Am.*, 637 F.2d 41, 49 (2d Cir. 1980) (*Illinois Brick* does not bar suits by indirect purchasers who are the target of an unlawful conspiracy) (dicta); *In re Fine Paper Litig. State of Wash.*, 632 F.2d 1081, 1090 (3d Cir. 1980) (partial assignment of cause of action by direct purchasers to indirect purchasers does not conflict with policies enunciated in *Illinois Brick*); *In re Mid-Atlantic Toyota Antitrust Litig.*, 516 F. Supp. 1287 (D. Md. 1981) (*Illinois Brick* not applicable where indirect purchaser buys from participant in the antitrust conspiracy); *Pollock v. Citrus Assoc. of the N.Y. Cotton Exch.*, 512 F. Supp. 711, 718 (S.D.N.Y. 1981) (fact that buyers and sellers utilized agents in entering futures contract did not require conclusion that buyer was an indirect purchaser); *Soskel v. Texaco*, 514 F. Supp. 578 (S.D.N.Y. 1981) (fact that plaintiffs purchased overpriced gasoline from Texaco franchises did not require conclusion that they were not direct purchasers of Texaco); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 119 (D. Minn. 1980) (where manufacturer and seller maintain a resale price maintenance conspiracy, plaintiff purchaser is a "direct purchaser" for purposes of applying *Illinois Brick*); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980) (*Illinois Brick* not applicable to manufacturer's claim that the Japanese electronics industry engaged in a conspiracy to flood the American market with low-cost goods) *aff'd in part, rev'd and remanded in part sub nom. In re Japanese Electronics Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983) (without addressing pass-on theory); *In re Airport Car Rental Antitrust Litig.*, 474 F. Supp. 1072 (N.D. Calif. 1979) (car rental company not barred from suing on theory that airport and other car rental agencies conspired to exclude plaintiff's licensees from operating business on airport premises).

On the other hand, some courts have extended the prohibition of pass-on theory to circumstances which differ from those present in *Illinois Brick*, such as claims by sellers who allege that indirect purchasers were involved in a conspiracy to hold the purchase price of products at artificially low levels. See, e.g., *Zinser v. Continental Grain Co.*, 660 F.2d 754 (10th Cir. 1981) (plaintiff wheat farmers precluded from maintaining suit against grain companies on theory that grain companies conspired to cause middlemen to purchase wheat at artificially low prices), cert. denied, 455 U.S. 941 (1982); cf. *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1153 (5th Cir. 1979) (claims for damages by cattlemen due to an alleged combination of retail food chains to limit beef prices were properly determined to be within the ambit of *Illinois Brick*), cert. denied, 449 U.S. 905 (1980).

66. 480 F. Supp. 1091 (D. Md. 1979).

67. *Id.* at 1101. The plaintiff alleged that the defendant "abused its alleged mo-

defendant's products, pursued several causes of action, including a price fixing allegation and several claims of discriminatory conduct.⁶⁸ The court quickly dismissed the price fixing allegations because the plaintiff could not prove them without introducing pass-on evidence.⁶⁹ However, because the court believed that *Illinois Brick* barred suits based on pass-on theory "only in those situations where the plaintiff's injury is premised on an 'overcharge,'" it declined to dismiss the claims of discriminatory conduct.⁷⁰ The court noted that "to the extent that plaintiff was the victim of such conduct, it is the one who was directly injured."⁷¹ The court determined that proof of the amount charged the plaintiff over the amount charged its competitors

monopolize position by engaging in discriminatory conduct which injured competition in plaintiff's market and thereby injured the plaintiff in its business or property." *Id.* The court noted that "[i]n order to prove this injury plaintiff will have to show discrimination in the prices, services, and products which defendant made available to plaintiff in contrast to those offered to plaintiff's competitors." *Id.*

68. *Id.* at 1096. The *Dart Drug* plaintiff alleged a conspiracy between the manufacturer-defendant and others to monopolize the market for certain glass products in violation of § 2 of the Sherman Act. *Id.* Section 2 of the Sherman Act states in relevant part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

15 U.S.C. § 2 (1982).

The plaintiff alleged that Corning Glass Works and others engaged in an unlawful combination to monopolize the "manufacture, distribution and sale of glass and glass ceramic utensils for the cooking and storage of food which have the characteristic of being resistant both to extreme high and low temperatures while at the same time having decorative qualities rendering them useful and desirable for the serving of food." 480 F. Supp. at 1096.

69. 480 F. Supp. at 1097-1106. The *Dart Drug* court considered whether the plaintiff's price-fixing claims fell within the *Illinois Brick* "ownership or control" exception. *Id.* at 1102-04. The plaintiff had alleged in its amended complaint that the defendant had engaged in a vertical conspiracy with wholesalers or distributors. *Id.* at 1103. The plaintiff argued that the allegation of the existence of the conspiracy was "sufficient to raise the issue of defendant's control of the intermediate level in the chain of distribution, bringing plaintiff within the control exception." *Id.* Because the alleged co-conspirators were not named as parties defendant, the court dismissed the claims against the defendant. *Id.* The court noted that the defendant could not utilize a finding of a vertical conspiracy in the present case to prevent the alleged co-conspirators from denying the conspiracy and suing the defendant in a separate action. *Id.* (quoting *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980)). For a discussion of the "ownership or control" exception to the *Illinois Brick* rule, see notes 61-64 and accompanying text *supra*. For a discussion of the applicability of *Illinois Brick* to vertical conspiracies, see notes 74-79 and accompanying text *infra*.

70. 480 F. Supp. at 1101 (citing *Illinois Brick*, 431 U.S. 720 (1977)). In addition to the overcharge requirement, the court noted, *Illinois Brick* "bars suit only. . . where, in order to prove [his] injury, plaintiff must also demonstrate that persons in the chain of distribution between plaintiff and the antitrust violator passed on the overcharge to the plaintiff." *Id.* *Accord* *Chatham Brass Co. v. Honeywell, Inc.*, 512 F. Supp. 108, 116 (S.D.N.Y. 1981).

71. 480 F. Supp. at 1101. The court also held that the rule of *Illinois Brick* was inapplicable to allegations that the defendant had conspired with its distributors to

"would not involve proof of the amount of the overcharge which was passed down the chain of distribution."⁷² Instead, the court reasoned, a comparison of the relative prices charged the plaintiff and its competitors would approximate the damages incurred by the plaintiff as a result of the

refuse to deal with the plaintiff. *Id.* at 1105. The court noted that such claims do not involve proof of a passed-on overcharge. *Id.*

72. *Id.* at 1101. Because the plaintiff was alleging discriminatory conduct, the court explained, no proof of passed-on charges was necessary "because 'pass-on' is irrelevant to the case." *Id.* Accord *Chatham Brass Co. v. Honeywell, Inc.*, 512 F. Supp. 108, 116 (S.D.N.Y. 1981). In *Chatham Brass*, a manufacturer sued another manufacturer for damages resulting from the alleged monopolization by the defendant of the market for certain air conditioner components in violation of § 2 of the Sherman Act. *Id.* at 110, 116. For the pertinent text of § 2 of the Sherman Act, see note 68 *supra*. The *Chatham Brass* plaintiff alleged that the defendant set up a two-tiered pricing system which denied the plaintiff the right to purchase goods from the defendant at favorable prices. 512 F. Supp. at 110-11. The plaintiff was thereby forced to purchase the goods from certain direct purchasers who were able to obtain the goods from the defendant at the lower price. *Id.* at 111. In rejecting the defendant's assertion of an *Illinois Brick* defense, the court concluded that the plaintiff was "complaining, not of injury resulting from the passing on of a price-fixing overcharge by a middleman, but rather of direct injury from Honeywell's alleged success in creating sufficient monopoly power to raise prices." *Id.* at 116.

The plaintiff also alleged the existence of a conspiracy between the defendant and certain unnamed distributors to set territorial limits on resales of the defendant's products to achieve a monopoly position for the products and to exclude non-cooperating purchasers such as the plaintiff from the market. *Id.* The court rejected the defendant's assertion of the rule of *Illinois Brick*:

Illinois Brick does not apply at all to this factual situation: this is not a claim by a plaintiff injured only by virtue of its status as an indirect purchaser; rather, it is a claim by a plaintiff asserting that it has been forced to assume the status of an indirect purchaser and to bear the additional costs incident to that status as a direct result of a conspiracy whose purpose and effect was to exclude it and other noncooperating distributors from favored purchaser status, in violation of the antitrust laws.

Id.

The Second Circuit has also indicated recognition of a "target of the conspiracy" exception to *Illinois Brick*. *Schwimmer v. Sony Corp. of Am.*, 637 F.2d 41, 48-49 (2d Cir. 1980). In *Schwimmer*, a seller of television and electronic appliances sued an electronics manufacturer, alleging that the defendant engaged in a conspiracy with its dealers to employ anticompetitive devices to damage the seller's business. *Id.* at 42-43. The Second Circuit warned that "a court must guard against a situation in which a seller interposes a middleman as a shield against an antitrust liability, especially where the middleman is a subsidiary of the seller." *Id.* at 48-49 (footnotes omitted). The court ruled that "an indirect purchaser is considered a 'target' of a seller's price discrimination if there is evidence that the discrimination was 'aimed at' the indirect purchaser by virtue of the nature and foreseeable effect of the antitrust conspiracy." *Id.* at 49. The court affirmed the lower court's determination that the plaintiff was not in the target area of the alleged conspiracy and dismissed the claims. *Id.*

The *Schwimmer* court discussed a target area exception to *Illinois Brick* in its analysis of the plaintiff's standing to sue. *Id.* at 46-49. The *Dart Drug* court, on the other hand, clearly distinguished its discussion of standing from the discussion of *Illinois Brick*'s applicability to claims of discriminatory conduct. *Dart Drug*, 480 F. Supp. at 1101.

defendant's discriminatory conduct.⁷³

Other courts have held the rule of *Illinois Brick* inapplicable where the plaintiff purchased directly from an intermediary who participated in a vertical conspiracy⁷⁴ to violate the antitrust laws.⁷⁵ In *Fontana Aviation v. Cessna Aircraft Co.*,⁷⁶ the Seventh Circuit indicated its approval of such an exception, even though the alleged co-conspirator intermediary was not named as a defendant in the action.⁷⁷ Some courts have been more reluctant to recognize the exception absent joinder of all conspirators, because a finding of a vertical conspiracy would have no collateral estoppel effect in an action by the unnamed conspirator seeking damages from the defendant in the original action.⁷⁸ These courts have reasoned that without joinder of all co-con-

73. *Dart Drug*, 480 F. Supp. at 1101. The court also concluded that *Illinois Brick* would not bar the plaintiff's claim for injunctive relief. *Id.* at 1104-05. For a discussion of *Illinois Brick*'s relevance to actions for injunctions, see notes 80-85 and accompanying text *infra*.

74. A vertical conspiracy involves an agreement between buyers and sellers in the vertical chain of distribution. See generally E. KINTNER, AN ANTITRUST PRIMER 42-46 (1973). A horizontal conspiracy involves an agreement between parties which compete with one another. *Id.*

75. See *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 119 (D. Minn. 1980) (where plaintiff purchases from a participant in resale price maintenance conspiracy, overcharge is incurred directly); *Gas-A-Tron v. American Oil Co.*, 1977-2 Trade Cas. ¶ 61,789 (D. Ariz. 1977) (no passed-on overcharge exists where plaintiff purchases from participant in vertical conspiracy). For a discussion of the applicability of the *Illinois Brick* rule to vertical conspiracies, see generally Comment, *supra* note 33, at 331-32, and authorities cited therein.

76. 617 F.2d 478 (7th Cir. 1980).

77. *Id.* at 479. *Fontana Aviation* involved a suit by a seller of new and used aircraft against Cessna Aircraft and its wholly owned financing subsidiary. *Id.* at 478-79. The plaintiff, who was also in the business of performing custom installation of non-Cessna avionics equipment, sought damages for the defendants' alleged attempt to monopolize the avionics equipment market. *Id.* at 479. Because the plaintiff did not purchase aircraft directly from Cessna but through an independent dealer, the district court, relying on *Illinois Brick*, granted the defendant's motion for summary judgment. *Id.* The Seventh Circuit, noting that the plaintiff alleged that the independent dealer was a co-conspirator, reversed, ruling that "[w]e are not satisfied that the *Illinois Brick* rule applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer." *Id.* at 481. Cf. *Florida Power Corp. v. Granlund*, 78 F.R.D. 441, 443 (M.D. Fla. 1978) (failure to recognize vertical conspiracy exception "would immunize from antitrust liability any manufacturer who conspired with his suppliers to fix the price of the supplied raw material"). Alternatively, the *Fontana Aviation* court ruled that *Illinois Brick* did not bar financial recovery to the plaintiff, who did not "seek damages for an illegal indirect overcharge passed on to it as is prohibited by *Illinois Brick*, but sue[d] on the basis of a combination of acts allegedly causing competitive injury which destroyed its avionics business." *Id.* Cf. *Dart Drug*, 480 F. Supp. at 1101 (*Illinois Brick* not applicable where defendant engages in discriminatory conduct to damage plaintiff's business). For a discussion of *Dart Drug*, see notes 66-73 and accompanying text *supra*.

78. See *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1163 (5th Cir. 1979) (citation omitted), cert. denied, 449 U.S. 905 (1980). The *Beef Industry* court was concerned that the unnamed conspirator-intermediary in the suit could successfully convince another court that no conspiracy existed and recover against the *Beef Industry*

spirators, the *Illinois Brick* policy of avoiding the risk of duplicative recovery was directly contravened.⁷⁹

Courts have been particularly reluctant to apply *Illinois Brick* to claims for injunctive relief.⁸⁰ In *Mid-West*, the Third Circuit argued that the considerations of *Illinois Brick*—the risk of duplicative recoveries and trial complications—were not present in section 16 actions for injunctive relief.⁸¹ Noting that the language and judicial construction of sections 4⁸² and 16⁸³ reflected a policy favoring liberal dispensation of injunctive relief,⁸⁴ the court concluded that *Illinois Brick* did not affect section 16 claims.⁸⁵

defendants. *Id.* The court concluded that because the intermediaries were not parties to the suit, “the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendant subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable.” *Id. Accord In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 972 (1984) (retail dealers must be joined as defendants if plaintiffs seek to prove conspiracy with defendant oil companies); *Technical Learning Collective, Inc. v. Daimler-Benz Antiengesellschaft*, 1980-81 Trade Cas. ¶ 63,612 (D. Md. 1980) (*Illinois Brick* does not permit an unnamed co-conspirator exception). *But cf. In re Mid-Atlantic Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1296 (D. Md. 1981) (plaintiffs permitted to amend complaint to include unnamed co-conspirators as defendants). Some courts have impliedly recognized an unnamed co-conspirator exception, but none of these courts have analyzed the exception in terms of the risk of multiple liability. *See Fontana Aviation*, 617 F.2d at 481; *Abrams v. Interco*, 1980-2 Trade Cas. ¶ 63,292 (S.D.N.Y. 1980); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115 (D. Minn. 1980); *Vermont v. Densmore Brick Co.*, 1980-2 Trade Cas. ¶ 63,347 (D. Vt. 1980); *In re Anthracite Coal Antitrust Litig.*, 1978-1 Trade Cas. ¶ 62,059 (M.D. Pa. 1978). It is doubtful that the *Beef Industry* court’s concern with inconsistent adjudications would be applicable to the *Fontana Aviation* case, which did not involve passed-on overcharges. *See* 617 F.2d at 478-81.

One court, while accepting the reasoning of *Beef Industry*, has ruled that joinder of co-conspirators is not necessary where the plaintiff claims to have been the direct target of the conspiracy. *See Chatham Brass Co. v. Honeywell Inc.*, 512 F. Supp. 108, 112, 116 (S.D.N.Y. 1981). For a discussion of *Chatham Brass*, see note 72 *supra*.

79. For a discussion of cases which have rejected an unnamed co-conspirator exception due to the risk of multiple liability, see note 78 *supra*.

80. *See, e.g., Beef Industry*, 600 F.2d at 1167 (policy considerations underlying pass-on rule inapplicable to suits for injunctive relief). *Accord Dart Drug*, 480 F. Supp. at 1105.

81. *Mid-West*, 596 F.2d at 590.

82. For the text of § 4 of the Clayton Act, see note 16 *supra*.

83. For the text of § 16 of the Clayton Act, see note 17 *supra*.

84. 596 F.2d at 590-92. The *Mid-West* court was influenced by the Supreme Court’s decision in *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972). *See Mid-West*, 596 F.2d at 591 n.70. In the context of a case that did not directly implicate pass-on theory, the *Hawaii v. Standard Oil* Court distinguished § 4 suits for damages from § 16 actions for injunctions. *Hawaii v. Standard Oil*, 405 U.S. at 260-62. The Court noted that whereas “[a]ny person, firm, corporation or association” is entitled to injunctive relief, the § 4 damage remedy is limited to persons “who shall be injured in [their] business or property.” *Id.* (quoting 15 U.S.C. §§ 26, 15 (1982)). The Court concluded that the contrast in language was due to Congressional recognition of essential differences in the nature of relief: whereas one injunction against an activity is as effective as a hundred, multiple suits for damages will lead to multiple recoveries. *Id.* at 261-62. For further discussion of *Hawaii v. Standard Oil*, see note 52 *supra*.

85. 596 F.2d at 594.

In *Blue Shield v. McCready*,⁸⁶ the Supreme Court considered the applicability of pass-on restrictions in circumstances which differed sharply from those of *Illinois Brick*.⁸⁷ *Blue Shield* involved a class action brought by a pre-paid health plan subscriber who alleged a conspiracy between Blue Shield and a group of psychiatrists to prevent psychologists from receiving compensation under the plan.⁸⁸ The defendant argued that *Illinois Brick* required that recovery under section 4 be limited to the psychologist rather than the patient.⁸⁹ Because the psychologist had been fully paid, the Court determined that he could not claim to have suffered any injury.⁹⁰ Under those circumstances, the Court ruled, the risk of duplicative recovery, with which the *Illinois Brick* Court was concerned, was not present.⁹¹

86. 457 U.S. 465 (1982).

87. *Id.* at 474-75. See *Illinois Brick*, 431 U.S. at 726. In *Illinois Brick*, a group of indirect purchasers sued a concrete block manufacturer, alleging that the manufacturer's overcharge had passed through two levels of distribution to the plaintiffs. *Id.* In *Blue Shield*, a health plan subscriber sued a health plan for damages resulting from its practice of refusing reimbursement for psychotherapy performed by psychologists while providing reimbursement for comparable treatment by psychiatrists. 457 U.S. at 467. Unlike *Illinois Brick*, *Blue Shield* did not involve passed-on overcharges. *Id.* at 467, 474-75. The issues in *Blue Shield* were (1) whether the policies enumerated in *Illinois Brick* would be implicated by permitting plaintiff to sue; and (2) whether the injury was too remote from the antitrust violation to give the plaintiff standing to sue. 457 U.S. at 474-75, 476. For a discussion of the distinction between these two issues, see note 91 *infra*.

88. 457 U.S. at 467-68. McCready was a member of a group plan, which her employer had purchased from Blue Shield. *Id.* at 468. The plan specifically provided that a portion of the cost of any necessary outpatient psychotherapy would be reimbursed. *Id.* However, Blue Shield reimbursed subscribers for psychotherapy only where a psychiatrist had performed the services. *Id.* McCready claimed reimbursement for the cost of treatment by a clinical psychologist, but these claims were "routinely denied." *Id.*

McCready brought suit under § 4 on behalf of all Blue Shield subscribers who, over a 5-year period, had incurred costs for psychological services but who had not been reimbursed. *Id.* at 468-69. She alleged that Blue Shield had conspired with the Neuropsychiatric Society of Virginia "to exclude and boycott psychologists from receiving compensation under" the health plans and that the denial of her claim for reimbursement had been in furtherance of this conspiracy. *Id.* at 469-70 (quoting Appellee's Brief at 44) (further citations omitted). The district court granted defendant's motion to dismiss on the ground that clinical psychologists were the parties competitively endangered by the alleged conspiracy, and that plaintiff's injury was "too indirect and remote to be considered 'antitrust injury.'" *Id.* at 470-71 (quoting Appellee's Brief at 18).

89. *Id.* at 472-75. McCready did not allege a passed-on overcharge, as opposed to the plaintiffs in *Illinois Brick*. See *Illinois Brick*, 431 U.S. at 726-27. The *Blue Shield* Court could have ruled that *Illinois Brick* was inapplicable to claims which are not based on proof of passed-on overcharges; instead, the Court distinguished the facts in *Blue Shield* from the concerns of *Illinois Brick*. See *Blue Shield*, 457 U.S. at 474-75. Prior to *Blue Shield*, some lower federal courts had indicated that *Illinois Brick* was limited to "overcharge" circumstances. See, e.g., *Dart Drug*, 480 F. Supp. at 1101. For a discussion of *Dart Drug*, see notes 66-73 and accompanying text *supra*.

90. 457 U.S. at 475.

91. *Id.* at 474-75. The Court next considered whether the plaintiff had suffered an injury too remote from the alleged antitrust violation to give her standing to sue for damages under section 4. *Id.* at 476-84. See *Illinois Brick*, 457 U.S. at 474-75. The

The Court explained that *Illinois Brick* had rejected apportionment of damages between direct and indirect purchasers because the concomitant splintered recoveries and litigative burdens would undermine active private enforcement of the antitrust laws.⁹² Because *Blue Shield* did not involve a

Court noted that the rule of *Illinois Brick* was "analytically distinct" from the issue of antitrust standing. *Blue Shield*, 457 U.S. at 476. Some confusion had existed among the federal courts as to whether *Illinois Brick* had created a rule of standing. *See, e.g.*, *Parkview Markets Inc. v. The Kroger Co.*, 1978 Trade Cas. ¶ 62,373 (S.D. Ohio 1978) (plaintiff lacked "standing" under *Illinois Brick*). Despite the Supreme Court's clear instruction that the concepts were distinct, at least one federal court does not distinguish the concerns of *Illinois Brick* from the issue of antitrust standing. *See Stein v. United Artists Corp.*, 691 F.2d 885, 895 (9th Cir. 1982) (the *Illinois Brick* Court "denied standing" to an indirect purchaser) (emphasis added).

"The term 'standing' denotes the status of being a proper party to maintain a private antitrust action." *Berger & Bernstein, An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 810 n.4 (1977). The determination of whether a plaintiff satisfies antitrust standing requirements involves analysis akin to proximate cause considerations. *See Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49, 89 (1969). The *Blue Shield* Court concluded that the plaintiff had established sufficient standing because her injury flowed logically from the claimed violations and the defendants' scheme fell squarely within the area of Congressional concern. *Blue Shield*, 457 U.S. at 484.

Prior to *Blue Shield*, the Supreme Court had declined to address the standing issue squarely. *See Note, Right to Sue Under Section 4 of the Clayton Act—The Employee Discharged for Refusal to Participate in the Anticompetitive Practices of His Employer: Bichan v. Chemetron Corp. Examined in Light of Blue Shield v. McCready*, 1983 B.Y.U. L. REV. 173, 185 n.77. As a result, the lower federal courts were left to formulate their own standing tests. *See id.* at 179 n.44. The Third Circuit had proposed a "factual matrix" test in *Cromar Co. v. Nuclear Materials and Equip. Co.*, 543 F.2d 501, 506 (3d Cir. 1976). *See also Bravman v. Bassett Furniture Indus.*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977). The *Blue Shield* Court expressly declined to evaluate this approach or any other standing test. *Blue Shield*, 457 U.S. at 476 n.12.

The Third Circuit's most detailed discussion of the standing issue is contained in *Mid-West Paper Prods. v. Continental Co.*, 596 F.2d 573 (3d Cir. 1979). In *Mid-West*, the plaintiff pursued several claims against an antitrust violator, including an allegation that the defendant was liable for damages resulting from the plaintiff's purchases of goods from the defendant's non-conspirator competitor. *Id.* at 580. The plaintiff theorized that the defendant's conduct permitted competitors to raise price levels to heights that otherwise would not be possible. *Id.* The court formulated a multi-factored standing test which grafted the "analytically distinct" issues of the definition of antitrust injury "and [the use of] pass-on theories upon the concept of antitrust standing." *Id.* at 582. The standing question, the court reasoned, involved several considerations: whether the plaintiff has suffered an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful," and whether a consideration of the risks of duplicative recovery and trial complications mitigated against permitting the plaintiff to pursue his claim. *Id.* at 582-83 (citing *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977)) (other citations omitted). The court concluded that "the line drawing that necessarily takes place is informed by what posture best effectuates the dual purpose of the treble damage remedy . . . while at the same time furthering the overriding goals of the antitrust laws—preserving competition." *Id.* at 583. The court decided that although the plaintiff was within the level of the economy threatened by the price-fixing scheme, he was not "among those 'whose protection is the fundamental purpose of the antitrust laws,'" and thus should not be afforded standing. *Id.* (quotation not identified by the court).

92. *Blue Shield*, 457 U.S. at 474 (citing *Illinois Brick*, 431 U.S. at 745-47). The

chain of plaintiffs claiming damages from a single transaction which violated the antitrust laws, the Court determined that *Illinois Brick* should not bar recovery.⁹³

Against this background, the *Merican* court considered whether the rule of *Illinois Brick* precluded plaintiff trading companies from maintaining a treble damage claim against their indirect seller for injury resulting from an alleged conspiracy to destroy the plaintiffs' business.⁹⁴ Judge Hunter, writing for the court, acknowledged the Supreme Court's interpretation of congressional intent to limit the availability of the section 4 remedy.⁹⁵ He noted that in response to this intent, the Supreme Court recognized two distinct types of limitations on the availability of the section 4 remedy: the requirements of antitrust standing and the rule of *Illinois Brick*.⁹⁶ Consideration of

Blue Shield Court continued: "The [*Illinois Brick*] Court concluded that direct purchasers rather than indirect purchasers were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble damages remedy was intended to promote." *Id.* (citing *Illinois Brick*, 431 U.S. at 735).

In addition, the *Blue Shield* Court stated that its prior cases illustrated a subordinate concern:

Where consistent with the broader remedial purpose of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the need for "massive evidence and complicated theories" where the consequences would be to discourage vigorous enforcement of the antitrust laws by private suits.

457 U.S. at 485 n.11 (citation omitted).

93. 457 U.S. at 474-75.

94. 713 F.2d at 962 & n.7. For a discussion of the plaintiffs' allegations, the defendant's motion to dismiss, and the question certified for appeal to the Third Circuit, see notes 16-23 and accompanying text *supra*.

95. 713 F.2d at 962 (quoting *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 263 n.14 (1972) ("Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.")) (further citation omitted).

Judge Hunter stated that the Supreme Court had mandated a consideration of § 4 claims "in light of the statutory purposes behind the awarding of treble damages: to deter antitrust violators and deprive them of 'the fruits of their illegality,' and to compensate victims of antitrust violations for their injuries." 713 F.2d at 962-63 (quoting *Pfizer, Inc. v. India*, 434 U.S. 308, 314 (1978)).

96. 713 F.2d at 963 (citing *Blue Shield*, 457 U.S. at 465; *In re Coordinated Pre-trial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1340 n.6 (9th Cir. 1982)). The first limitation, Judge Hunter explained, identifies "certain classes of plaintiffs who, although able to trace an injury to an antitrust violation, are generally not within the group of 'private attorneys general' Congress created to enforce the antitrust laws under section 4." 713 F.2d at 963 (citing *Illinois Brick*, 431 U.S. at 746; *Hawaii v. Standard Oil*, 405 U.S. at 262). For a discussion of *Illinois Brick* in general and the Court's holding that indirect purchasers could not sue under § 4 based on passed-on overcharges, see notes 42-55 and accompanying text *supra*. For a discussion of *Hawaii v. Standard Oil*, and the limitation on § 4 suits by states as *parens patriae*, see note 52 *supra*.

The second limitation on § 4 actions, Judge Hunter continued, was the "analytically distinct" and "'conceptually more difficult question 'of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages under § 4.'" 713 F.2d at 964 (quoting *Blue Shield*, 457 U.S. at 476 (quoting *Illinois Brick*, 431 U.S. at 728 n.7)) (emphasis supplied by the *Blue Shield*

the latter limitation, which the district court ignored,⁹⁷ resulted in the Third Circuit's dismissal of the section 4 claim.⁹⁸

Judge Hunter explained that the *Illinois Brick* Court was motivated by two policies when it held that indirect purchasers in a chain of distribution could not assert a section 4 action based on the theory that the direct purchasers had passed on overcharges imposed by the antitrust violator.⁹⁹ The first policy, he stated, was to prevent the risk of duplicative recovery which would arise if every person in the chain of distribution could recover damages based on the same violation.¹⁰⁰ The second policy identified by Judge Hunter was to avoid discouraging private enforcement of the antitrust laws by burdening section 4 actions with complicated damage issues such as the theory of passed-on damages.¹⁰¹ Judge Hunter indicated that these two policies must be considered in light of the broader remedial purposes of the antitrust laws in order to determine whether the plaintiff in a given case ought to be permitted to maintain a treble damages action.¹⁰²

Court). For a discussion of *Blue Shield*, the relevant factors in the antitrust standing-proximate cause analysis, and the approach taken by the Third Circuit, see note 91 *supra*.

97. 713 F.2d at 966. As Judge Hunter noted, Caterpillar claimed that plaintiffs' alleged injury was dependent upon the decision of a Caterpillar-authorized dealer to raise his prices in response to the smaller discount given on sets to be used outside his service area, essentially a pass-on theory. *Id.* at 965. For a complete discussion of the events which gave rise to the suits, see notes 1-15 and accompanying text *supra*. Judge Hunter stated that while the defendant argued that *Illinois Brick* precluded suit by an indirect purchaser based on passed-on damages, the district court's denial of the motion to dismiss was based "on the analytically distinct issue of whether [plaintiffs] had 'standing' to maintain an action for damages." 713 F.2d at 966. The Third Circuit noted that the district court concluded the plaintiffs had standing because they had alleged that they were the direct target of an unlawful conspiracy which forced them out of business. *Id.* While acknowledging that the fact that plaintiffs were targeted might be relevant under *Blue Shield* standing analysis, Judge Hunter stated that the target theory was not relevant under *Illinois Brick*. *Id.* (citations omitted). He continued: "We do not suggest that standing issues should have been ignored by the district court, only that they limit the § 4 remedy in a different way. For the purposes of this appeal, Caterpillar has conceded that [plaintiffs] would have standing if their claims are not barred by *Illinois Brick*." *Id.* at 966 n.19 (citing Brief of Appellant at 5 n.4).

98. 713 F.2d at 966. Judge Hunter explained that the district court had failed to conduct the proper inquiry under *Illinois Brick*, which was "whether [plaintiffs] are in the class of persons considered to be injured in their business or property under section 4 by an antitrust violation." *Id.* (citations omitted). This policy determination, he continued, is based on two factors: the possibility of duplicative recovery and the potential for overly complex proofs of damages. *Id.* (citations omitted). The Third Circuit found reversible error in the district court's failure to explicitly address these issues. *Id.*

99. 713 F.2d at 963-64 (citations omitted). For a discussion of *Illinois Brick*, see notes 42-55 and accompanying text *supra*.

100. 713 F.2d at 963-64 (citation omitted).

101. *Id.* at 964. Judge Hunter acknowledged that the Supreme Court had identified the complex damages limitation as a "subordinate theme." *Id.* at 964 n.10 (citing *Blue Shield*, 457 U.S. at 475 n.11).

102. See 713 F.2d at 964. Judge Hunter summarized: "Only by the careful

The Third Circuit considered the plaintiffs' argument that the *Illinois Brick* bar was inapplicable to claims such as theirs, which did not involve horizontal, above-market price-fixing.¹⁰³ Plaintiffs alleged that Caterpillar had sought to eliminate their class of competition "through the innovative mechanism of a vertically-imposed economic penalty," and argued that dicta in *Mid-West* supported a distinction between this claim and a claim for passed-on overcharges.¹⁰⁴ The court rejected plaintiffs' reading and refused to limit *Illinois Brick* to claims of horizontal price fixing brought by indirect purchasers.¹⁰⁵ The court reasoned that the availability of the section 4 rem-

application of [the principles of antitrust standing and *Illinois Brick*] to the multitude of claims that potentially are swept within the scope of section 4 can courts properly effectuate Congress' antitrust policies of deterring antitrust violators and compensating victims of anticompetitive behavior." *Id.* at 965.

103. 713 F.2d at 966.

104. *Id.* at 966-67 (citing *Mid-West*, 596 F.2d at 585 & n.47). Judge Hunter noted that in *Mid-West*, the Third Circuit stated that a direct purchaser, consistent with *Illinois Brick*, could sue a price-fixing defendant because the damages were easily ascertained as the benefit derived by the defendant. 713 F.2d at 966 (citing *Mid-West*, 596 F.2d at 858) (footnote omitted). Judge Hunter then quoted the language relied upon by plaintiffs to support their assertion that claims other than horizontal above market price-fixing were outside the scope of *Illinois Brick*.

A different problem is presented where prices are fixed below the competitive market price or where defendants engaged in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable, and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants.

713 F.2d at 966 (quoting *Mid-West*, 596 F.2d at 585 n.47).

The plaintiffs, focusing on the first sentence of the footnote, argued that the listed types of anticompetitive conduct were *per se* outside the rule of *Illinois Brick*. *Id.* at 966-67. By characterizing their claim as a challenge to the defendant's effort to eliminate the plaintiffs' class of competitors from the market through a vertically-imposed economic penalty, Judge Hunter continued, plaintiffs argued that their case was outside the rule of *Illinois Brick*. *Id.* at 967.

105. 713 F.2d at 967. For a summary of the plaintiffs' interpretation of *Mid-West*, see note 104 *supra*. The *Merican* court refused to regard *Mid-West* as holding that claims other than horizontal price fixing were outside the scope of *Illinois Brick*:

Instead we read footnote forty-seven as observing that in certain situations the measure of damages for direct purchasers is based upon the injury suffered by the plaintiff, not the benefit obtained by the defendant. When defendants engage in below-market price fixing, group boycotts, vertical restraints, or monopolization, their benefits are sometimes not "readily ascertainable" and thus damages sought by proper plaintiffs must be measured by other means.

713 F.2d at 967.

The Third Circuit regarded its refusal to limit *Illinois Brick* to horizontal price constraints as consistent with precedent in the Third Circuit and elsewhere. *Id.* (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968)); *Stein v. United Artists Corp.*, 691 F.2d 885 (9th Cir. 1982); *Zinser v. Continental Grain Co.*, 660 F.2d 754 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982); *Edward J. Sweeny & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911

edy depended not on the plaintiffs' characterization of the offense but on whether the policies identified in *Illinois Brick* would be served if the claim were allowed.¹⁰⁶

Next, the Third Circuit addressed the plaintiffs' argument that, even considering the *Illinois Brick* policy concerns, their claim should be allowed.¹⁰⁷ The court noted that plaintiffs based this argument on their assertion that the direct purchaser had executed an affidavit which established that it had not suffered any injury which could form the basis of a section 4 action; hence there was no possibility of duplicative recovery.¹⁰⁸ Judge Hunter responded that the plaintiffs had not alleged in their complaint that the direct purchaser would not sue the defendant,¹⁰⁹ nor had they presented conclusive evidence that the direct purchaser had been spared injury.¹¹⁰

(1981); *In re Beef Industry Antitrust Litig.*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

106. 713 F.2d at 967-68. Judge Hunter reiterated: "Thus the scope of *Illinois Brick's* rule barring treble damage actions by certain persons must be determined in each case by examining whether allowing those persons to sue could create the possibility of duplicative recovery and overly complex damage claims." *Id.* at 968 (footnote omitted).

107. *Id.* at 968. The court noted that plaintiffs did not contend that they fell within any of the exceptions specifically mentioned in *Illinois Brick*. *Id.* Because the plaintiffs disavowed any reliance on a vertical conspiracy exception to *Illinois Brick*, the court reserved judgment as to whether the Third Circuit would recognize such an exception. *Id.* at 968 n.22 (citing Brief of Appellees at 36 n.26).

108. *Id.* at 968. The court quoted the pertinent language from the affidavit of the president of Ohio Machinery Co. (OMCO), the direct purchaser: "Neither the existence of the 5% [service fee] nor any changes in Caterpillar's administration thereof, including the 1978 or 1980 changes, has had any apparent effect on Ohio Machinery's incentive or ability to sell Caterpillar electric generators sets outside its service territory generally or in Saudi Arabia specifically." *Id.* (citing Appendix at 110E). Plaintiffs claimed that the affidavit had waived any cause of action that OMCO might have against Caterpillar on the basis of the transactions involved in plaintiffs' claim. *Id.* at 968 (citing Brief of Appellees at 34).

The plaintiffs had also argued that the danger of duplicative recovery was not present in the case "because they were suing not to recover the fee imposed by Caterpillar, but to recover the separate damages of [plaintiffs'] lost business and profits resulting from application of that fee to [the direct purchaser]." *Id.* at 969 n.23 (citing App. at 438I-39I). The court quickly dismissed this argument, noting that the plaintiffs had admitted "that the issues were intertwined and that the damage calculation would concentrate on the increased amount OMCO had to pay for the sets." *Id.* (citing App. at 440I). Furthermore, the court asserted, "by arguing that their damages are their lost profits resulting from Caterpillar's imposing the service fee on OMCO, [plaintiffs] implicate the second concern of *Illinois Brick*, that of overly complex and speculative damage theories." *Id.* (emphasis supplied by the court).

109. *Id.* at 968. The court noted, without deciding the issue, that the direct purchaser could possibly still have a cause of action under the antitrust laws based on the facts of the case. *Id.* at 968-69.

110. *Id.* at 969. The court reasoned that the fact that the direct purchaser's sales were not affected by Caterpillar's alleged antitrust violations "could merely reflect that demand for the sets in Saudia [sic] Arabia was relatively inelastic with respect to price." *Id.* Noting that the direct purchaser would have a remaining claim that its profit margin was less as a result of the defendant's action, the *Merican* court concluded that the risk of duplicative recovery existed. *Id.*

Furthermore, the court ruled that the legislative purpose behind the treble damage remedy was better served by concentrating recovery in the immediate purchaser than by apportioning damages over a larger class, even though direct purchasers might not sue their suppliers in all cases.¹¹¹

Finally, the Third Circuit rejected the plaintiffs' assertion that their proof of damages would not burden the trial with the "massive evidence and complicated theories" that the *Illinois Brick* rule was designed to prevent by observing that the plaintiffs' claims involved the same complications presented by the plaintiffs' damage theory in *Illinois Brick*.¹¹² The court concluded that "the damage issues [were] sufficiently uncertain so as to impair the effectiveness of the section 4 remedy."¹¹³ Thus, the court held that plaintiffs were not persons injured in their business or property by reason of the antitrust laws within the meaning of section 4.¹¹⁴

Judge Higginbotham, in dissent, agreed with the majority's assertion that the district court had failed to properly determine whether the potential for double recovery and excessive complexity barred the plaintiffs' section 4 action under the rule of *Illinois Brick*.¹¹⁵ However, he disagreed with the majority's conclusion that the policies identified in *Illinois Brick* would be advanced by dismissing the plaintiffs' cause of action.¹¹⁶ Judge Higginbotham felt that "the prosecution of this suit would be both consistent with *Illinois Brick* and necessary to avoid immunizing the anticompetitive tactic which the plaintiffs allege."¹¹⁷

Judge Higginbotham read *Blue Shield* to mean that the Supreme Court did not intend *Illinois Brick* to permit anticompetitive conduct to go unchallenged in all cases where there was not a direct relationship between the plaintiff and the defendant.¹¹⁸ He concluded that the courts should not only

111. *Id.* (quoting *Illinois Brick*, 431 U.S. at 741).

112. *Id.* The court stated that

to prove any damages . . . [plaintiffs] would have to calculate the service fee on each generator set purchased by [the direct purchaser], determine how the imposition of the fee and market forces affected the price paid by [plaintiffs], and finally estimate how any increased price affected [plaintiff's] profits and sales in light of competitive market forces in Saudi Arabia.

Id. (footnote omitted). The Third Circuit regarded this calculation as precisely what the *Illinois Brick* Court sought to avoid. *Id.*

113. *Id.* While the court recognized "that damage analysis in antitrust actions is often difficult and complex," it based its decision not on those factors, but on the uncertainty of the proof. *Id.*

114. *Id.* For the relevant portions of § 4, see note 16 *supra*.

115. *Id.* at 970 (Higginbotham, J., dissenting) (citing *Illinois Brick*, 431 U.S. 720 (1977)). The dissent also agreed "that *Illinois Brick* cannot be mechanically applied so that an antitrust plaintiff's ability to recover turns upon the affixing of handy labels to the nature of the wrong alleged or to the plaintiff's position in the marketing hierarchy." *Id.*

116. *Id.*

117. *Id.*

118. *Id.* (citing *Blue Shield*, 457 U.S. 465 (1982)). For a discussion of the facts and issues presented in *Blue Shield*, see notes 86-93 and accompanying text *supra*. Judge Higginbotham quoted language from *Blue Shield* in which the Court stated

be mindful of the policies underlying *Illinois Brick*, but also not lose sight of the "overarching policy" favoring compensation of victims of antitrust violations, deterrence, and the preservation of competition.¹¹⁹ The plaintiffs' claim, Judge Higginbotham argued, was based on an antitrust violation which was different in kind from the horizontal conspiracy alleged in *Illinois Brick*.¹²⁰ He argued that when a vertical conspiracy is involved, the injuries claimed are not simply passed on overcharges.¹²¹ Under such circumstances, he contended, the goals of avoiding duplicative recovery and excessive complexity do not warrant denying indirect purchasers a section 4 remedy.¹²²

Finally, Judge Higginbotham concluded that dismissal of the plaintiffs' suit would preclude regulation of an antitrust violation that could not otherwise be policed: the predatory destruction of the plaintiffs' businesses.¹²³

In analyzing the *Merican* decision, it is suggested that the court correctly

that in certain limited circumstances, the feasibility of damage theories may be considered in determining who may sue under § 4 "[w]here consistent with the broader remedial purposes of the antitrust laws." 713 F.2d at 970 (Higginbotham, J., dissenting) (quoting *Blue Shield*, 457 U.S. at 475 n.11) (further quotation omitted) (emphasis supplied by Judge Higginbotham).

119. 713 F.2d at 970 (Higginbotham, J., dissenting) (quoting *Mid-West*, 596 F.2d at 583).

120. *Id.* Judge Higginbotham claimed that the Third Circuit's discussion of the sweep of *Illinois Brick* in *Mid-West* indicated the court's implicit recognition that the unique nature of certain types of anticompetitive conduct, such as vertical conspiracies, inspired the court to assert that such conduct was outside the limits of *Illinois Brick*. *Id.* at 970-71 (Higginbotham, J., dissenting) (citing *Mid-West*, 596 F.2d at 585 n.47). For the text of footnote 47 and the interpretation given by the majority, see notes 104-105 *supra*. Disagreeing with the majority's interpretation of *Mid-West*, Judge Higginbotham felt that footnote 47 supported his conclusion that plaintiffs' injuries were not the kind contemplated by the *Illinois Brick* Court:

I think it is clear from the context of footnote 47 and from its emphasis on compensating the antitrust plaintiff that where an indirect purchaser has suffered injury other than incurring the cost of the passed-on overcharge neither the policy of compensating injury nor that of deterring anticompetitive conduct can be realized unless the indirect purchaser can bring action against the seller.

713 F.2d at 971 (Higginbotham, J., dissenting) (citing *Mid-West*, 596 F.2d at 585 n.47 (quotation omitted)).

In Judge Higginbotham's view, the policy of avoiding complexity in treble damages actions originated in the belief that vigorous policing of the marketplace would suffer if damages had to be allocated among multiple parties. *Id.* He quoted his own statement from *Mid-West*: "Where added complexity does not result in a disincentive to the enforcement of the antitrust laws, its potency as an argument against standing is seriously diminished." *Id.* (quoting *Mid-West*, 596 F.2d at 599 (Higginbotham, J., dissenting)).

121. *Id.* at 971 (Higginbotham, J., dissenting). Judge Higginbotham cited the plaintiffs' claim as an example of the unique damages which result from antitrust violations which are not horizontal price-fixing conspiracies. *Id.* The *Merican* plaintiffs had alleged loss of sales and profits, reduction in the value of goodwill, and destruction of a significant portion of their business. *Id.*

122. *Id.*

123. *Id.* For a discussion of the *Dart Drug* court's disposition of a similar argument, see notes 70-73 and accompanying text *supra*.

distinguished standing analysis from pass-on theory.¹²⁴ However, the case demonstrates the conceptual difficulties which arise from application of the rule of *Illinois Brick*.¹²⁵ As the dissent intimated, the majority may have reached a different result had they more closely compared the allegations made by the plaintiffs in *Illinois Brick* with those made in the principal case.¹²⁶

In *Illinois Brick*, the alleged goal of the antitrust violators was to generate oligopoly profits through the imposition of a price fixing scheme.¹²⁷ Presumably, the violators did not care who was injured by their anticompetitive conduct.¹²⁸ In *Merican*, unlike *Illinois Brick*, the plaintiffs-indirect purchasers alleged that the defendant's goal was not to generate oligopoly profits but to destroy the plaintiffs' businesses.¹²⁹ If this allegation is assumed to be true,¹³⁰ then the defendant's scheme could not succeed unless a specific, identifiable injury was imposed upon the plaintiffs.¹³¹ Any injury to the

124. For a discussion of the distinction between standing analysis and pass-on theory, see note 91 *supra*. For a discussion of the Third Circuit's analysis of the differences between the two principles, see notes 96-98 and accompanying text *supra*.

125. For an exposition of these difficulties as framed by the dissent, see notes 115-23 and accompanying text *supra*. For a discussion of the conceptual difficulties encountered by courts concerning applicability of the rule of *Illinois Brick* to vertical conspiracies, see notes 74-79 and accompanying text *supra*. For a discussion of the *Dart Drug* court's refusal to apply the rule of *Illinois Brick* to claims of discriminatory conduct, see notes 70-73 and accompanying text *supra*.

126. See *Merican*, 713 F.2d at 970 (Higginbotham, J., dissenting). Judge Higginbotham observed:

Although the majority correctly determines that mere nomenclature cannot magically obviate consideration of the *Illinois Brick* issue, the differences between the injuries alleged here and those contemplated in *Illinois Brick*, require us to ask whether the goals of avoiding duplicative recovery and excessive complexity would be advanced by barring this suit.

Id.

127. See *Illinois Brick*, 431 U.S. at 726-27. For a discussion of the plaintiff's complaint in *Illinois Brick*, see note 43 and accompanying text *supra*.

128. See *Illinois Brick*, 431 U.S. at 727.

129. 713 F.2d at 961. In *Merican*, the plaintiffs alleged a conspiracy between Caterpillar, one of its authorized dealers, and "other unnamed corporations, firms and individuals . . . 'to allocate customers and territories for the sale of Caterpillar electric generator sets and to foreclose [plaintiffs] and other generator set marketers from engaging in price competition with defendant's authorized dealers.'" *Id.* at 961 & n.3 (quoting Complaint ¶ 21, app. at 18B).

130. See *Merican*, 713 F.2d at 965 n.18 (for purposes of the appeal, the court is required to assume that the plaintiffs could prove the facts alleged in their amended complaint) (citing *Associated Gen'l Contractors of Cal., Inc. v. California State Council of Carpenters*, 103 S. Ct. 897, 902 (1983)).

131. *Id.* at 961. It is submitted that this specific injury to the *Merican* plaintiffs is different in kind from the injury imposed generally by the *Illinois Brick* defendants upon its customers. Compare *Merican*, 713 F.2d at 961 (plaintiffs alleged a conspiracy "to allocate customers and territories for the sale of Caterpillar electric generator sets and to foreclose [plaintiffs] and other generator set marketers from engaging in price competition with defendant's authorized dealers") with *Illinois Brick*, 431 U.S. at 727 (plaintiffs alleged "a combination and conspiracy to fix the prices of concrete block in violation of § 1 of the Sherman Act."). The alleged conspiracies in both cases were

direct purchaser was incidental to the activities aimed at the indirect purchaser.¹³² Conceptually, plaintiff's injury is qualitatively different from injuries suffered by others in the chain of distribution.¹³³

Whatever the merits of the *Illinois Brick* decision, it is questionable to apply the doctrine when the direct and indirect purchasers have suffered qualitatively different injuries.¹³⁴ Carried to its logical extreme, such a holding would bar suits by victims of discriminatory resale price maintenance agreements or vertically imposed boycotts simply because a direct purchaser

similar in that both involved the retention of income by the violators. See *Illinois Brick*, 431 U.S. at 727; *Merican*, 713 F.2d at 961. But in *Merican*, unlike *Illinois Brick*, the retention of income was not necessary in order for the conspiracy to succeed. Cf. *Dart Drug*, 480 F. Supp. at 1101 ("Proof of [plaintiff's] claim [of discriminatory conduct] does not in any way involve proof that defendant set prices of its goods above the competitive market, resulting in an 'overcharge,' or proof that any overcharge was passed on to plaintiff."). The accumulation of unclaimed service fees by the *Merican* defendant was only an incidental effect of the defendant's attempt to reach its ultimate goal. *Merican*, 713 F.2d at 961. This goal could have been achieved by other types of conduct which would not have involved the accumulation of service fees: for example, the defendant could have destroyed the plaintiffs' businesses by imposing a boycott to prevent sales by its authorized dealers to the plaintiffs, a clearly illegal activity. See *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941) (concerted refusal to deal is *per se* illegal). Such a scheme would have entitled the plaintiff to § 4 relief. See *Klor's v. Broadway Hales Stores*, 359 U.S. 207 (1959). Cf. *Merican*, 713 F.2d at 968 n.21 (plaintiffs characterized defendants' actions as constituting an illegal boycott). Instead, the defendant (allegedly) pursued a scheme which had the effect of damaging or destroying the plaintiffs' businesses, but which was protected by the rule of *Illinois Brick*.

132. For a discussion of the differences between the injuries alleged in *Merican* and those alleged in *Illinois Brick*, see notes 131 *supra* & 137-43 *infra* and accompanying text.

133. 713 F.2d at 971 (Higginbotham, J., dissenting) (plaintiffs' alleged loss of sales and profits, reduction in the value of goodwill and destruction of a significant portion of their businesses are claims which only the plaintiffs could present). See *Dart Drug*, 480 F. Supp. at 1101 (plaintiff was only person who could effectively present claim of injury due to discriminatory conduct).

Compare the allegations made by the *Merican* plaintiff concerning the objectives of the conspiracy with the claims of discriminatory conduct made by the plaintiffs in *Dart Drug*. See *Dart Drugs*, 480 F. Supp. 1099-1102. For a discussion of the *Dart Drug* court's disposition of these claims, see notes 70-73 and accompanying text *supra*. It is suggested that the *Merican* plaintiffs' claim that they were the direct target of an antitrust conspiracy was equivalent to the *Dart Drug* plaintiff's claim that it was the object of discriminatory conduct. See *Dart Drug*, 480 F. Supp. at 1101. It is asserted that the courts reached opposite results regarding these claims because the *Merican* court focused on the factual similarities between *Illinois Brick* and the case before it while the *Dart Drug* court focused on the conceptual problems encountered when attempting to apply pass-on theory to claims of discriminatory conduct. For a discussion of the *Merican* court's analysis of the plaintiffs' claims, see notes 113-15 and accompanying text *supra*. For a discussion of the *Dart Drug* court's analysis of the applicability of pass-on theory to claims of discriminatory conduct, see notes 66-73 and accompanying text *supra*.

134. For a discussion of the distinction drawn by the *Dart Drug* court between damages of direct purchasers and those of indirect purchasers where the indirect purchaser alleges discriminatory conduct, see notes 70-73 and accompanying text *supra*.

is interposed between defendant and plaintiff.¹³⁵ The *Merican* decision gives carte blanche to businesses who wish to avoid such distasteful tactics by structuring anticompetitive transactions in a manner which outwardly resembles the facts of *Illinois Brick*.¹³⁶

It is further suggested that the *Merican* court should not have equated the plaintiffs' damage allegations with the type of damage claims involved in the classic *Illinois Brick* circumstances.¹³⁷ In *Dart Drug*, the court carefully differentiated the plaintiff's price fixing claims from its claims of discriminatory conduct.¹³⁸ It is submitted that this distinction is correctly based on the recognition that pass-on theory is inapplicable to discriminatory schemes.¹³⁹ In *Illinois Brick*, the focus of the damage inquiry was on the damages sustained by the defendants' purchasers as a result of the defendants' alleged price fixing conspiracy.¹⁴⁰ In *Merican*, it is suggested that the focus should

135. Resale price maintenance (also known as vertical price-fixing) refers to an agreement in the form of a contract, combination, or conspiracy between or among independent entities within a single chain of distribution whereby, for example, a wholesaler and a retailer agree upon the price at which the retailer will resell goods that the wholesaler sells to the retailer.

KINTNER, FEDERAL ANTITRUST LAW, § 10.15, at 115 (1980). A group boycott is the means by which a concerted refusal to deal is effectuated. *See id.* § 10.27, at 155 n.500. "A concerted refusal to deal is defined as an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms." *Id.* § 10.27, at 155.

Perhaps the *Merican* plaintiffs could have alleged the existence of a conspiracy between the defendant and the direct purchaser from whom the plaintiffs purchased goods. The fact that the direct purchaser may have been a less-than-willing participant and might in fact have been injured as a result of the alleged conspiracy does not detract from its illegality. *Cf. Albrecht v. The Herald Co.*, 390 U.S. 145, 150 n.6 (rejecting notion that there can be no violation of § 1 of the Sherman Act unless benefit of anticompetitive agreement accrues to both parties to the agreement). The *Merican* plaintiffs could have then attempted to utilize the vertical co-conspirator exception to *Illinois Brick*. For a discussion of the vertical co-conspirator exception to *Illinois Brick*, see notes 74-79 and accompanying text *supra*.

136. *See Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978) (failure to recognize vertical conspiracy exception to *Illinois Brick* would create a loophole in antitrust laws).

137. For a discussion of the Third Circuit's analysis of the plaintiffs' damage claims, see note 116 *supra*. The *Merican* court was concerned that the plaintiffs would have to focus on the overcharge paid by the direct purchaser in proving their damage claims. 713 F.2d at 969 n.23. The court believed that such a proof would involve complex damage theories. *Id.*

In *Dart Drug*, the court noted that the plaintiff's allegation that the defendant engaged in discriminatory conduct did not "involve proof that defendant set prices of its goods above the competitive market, resulting in an 'overcharge,' or proof that any such overcharge was passed on to plaintiff." *Dart Drug*, 480 F. Supp. at 1101. It is submitted that the *Merican* plaintiff also did not have to prove either of these factors. For a discussion of why the *Merican* plaintiffs would not have had to prove these factors, see notes 139-42 and accompanying text *infra*.

138. *See Dart Drug*, 480 F. Supp. at 1099-1102.

139. For a discussion of the *Dart Drug* court's consideration of the applicability of pass-on theory to claims of discriminatory conduct, see notes 70-73 and accompanying text *supra*.

140. *See Illinois Brick*, 431 U.S. at 746-47. The plaintiffs in *Merican*, on the other

have been on the damages sustained by the plaintiffs as a result of the defendant's discriminatory conduct.¹⁴¹ The damage inquiry, therefore, would not involve proof of a passed-on overcharge¹⁴² but would instead focus upon injuries flowing from the alleged discrimination.¹⁴³

Allowance of the *Merican* plaintiffs' claim would have been consistent with the policies enumerated in *Illinois Brick*.¹⁴⁴ It is submitted that Judge Higginbotham was correct in stating that litigative burdens are not a proper consideration for a dismissal of a section 4 action unless the consequence would be to discourage vigorous enforcement of the antitrust laws by private suits.¹⁴⁵ This consideration was improperly applied to the claim of the

hand, asserted that the defendant manipulated its pricing policies to unfairly discriminate against independent marketers of its generator sets. 713 F.2d at 960.

141. *Cf. Dart Drug*, 480 F. Supp. at 1101 (defendant's discriminatory conduct will support plaintiff's claims). Had the Third Circuit framed the issue in this way, then proof of a passed-on overcharge would have been irrelevant to the analysis. As Judge Higginbotham noted, the *Merican* plaintiffs "allege[d] predatory destruction of their business—a complaint which only they may bring." 713 F.2d at 971 (Higginbotham, J., dissenting). It is asserted that the plaintiffs' damages resulting from the defendant's discriminatory conduct must be analyzed separately from any damage incidentally sustained by the direct purchaser, who allegedly was only a conduit through which the defendant could destroy the plaintiffs' businesses.

142. *See Merican*, 713 F.2d at 971 (Higginbotham, J., dissenting) (*Merican* does not involve proof of a passed-on overcharge). Although the *Merican* court focused on the similarities between *Merican* and *Illinois Brick*, it did not go so far as to characterize *Merican* as involving an "overcharge." *See id.* at 966-69. It is submitted that beyond the technical accuracy of this approach is a conceptual difference which was ignored by the court. In the normal overcharge case such as *Illinois Brick*, the plaintiff is injured by the overcharge itself. *See Illinois Brick*, 431 U.S. at 726-27. In *Merican*, it was the defendant's discriminatory conduct which allegedly caused the plaintiffs' damages. *See* 713 F.2d at 971 (Higginbotham, J., dissenting) (plaintiffs alleged predatory destruction of their business). *Cf. Dart Drug*, 480 F. Supp. at 1101 ("it is defendant's discriminatory conduct which will support [plaintiff's] claim, and to the extent that plaintiff was the victim of such conduct, it is the one who was directly injured"). If the allegations in *Merican* are assumed to be true, then the defendant's retention of unclaimed service fees was only a means to the predatory end.

143. *Cf. Dart Drug*, 480 F. Supp. at 1101. In *Merican*, like *Dart Drug*, the damage inquiry could have involved a comparison of prices paid by plaintiffs to prices paid by those who were not targets of the defendant's alleged scheme. *Id.* The *Dart Drug* court noted that such an inquiry did not involve proof of the amount of an overcharge passed down the claim of distribution. *Id.*

144. *See Merican*, 713 F.2d at 97 (Higginbotham, J., dissenting) (the goals of avoiding duplicative recoveries and excessive complexity are not implicated by plaintiffs' allegation that defendant engaged in the predatory destruction of their business).

145. *See Merican*, 713 F.2d at 971 (Higginbotham, J., dissenting). It is further submitted that the plaintiffs' claim would not involve the same damage analysis proscribed in *Illinois Brick*. The *Merican* court reasoned:

To prove damages . . . Appellees would have to calculate the service fee on each generator set purchased by OMCO, determine how the imposition of the fee and market forces affected the price paid by appellees, and finally estimate how any increased price affected Appellees' profits and sales in light of competitive market forces in Saudi Arabia. That type of calculation was the very analysis the Supreme Court sought to avoid in *Illinois Brick*

plaintiffs, who appeared to be the only parties willing to pursue an antitrust action against the defendant.¹⁴⁶ Furthermore, it is submitted that the plaintiffs' claim in *Merican* presented no danger of splintered or duplicative recovery. Only the plaintiffs could recover for damages sustained as a result of the defendant's alleged scheme to destroy their businesses.¹⁴⁷ It is suggested that herein lies one of the major difficulties with the prohibition of pass-on theory under circumstances which differ significantly from those which prevailed in *Illinois Brick*. If neither "litigative burdens" nor the "risk of duplicative recovery"¹⁴⁸ are implicated in *Merican*, then the result in *Merican* has no foundation in antitrust policy.¹⁴⁹

By refusing to hold that the plaintiffs' damage claims were outside the purview of *Illinois Brick*, the *Merican* court has created a loophole in the antitrust laws.¹⁵⁰ Those who wish to monopolize or restrain trade through the destruction of certain indirect purchasers need not do so directly and thereby open themselves to a possible section 4 action.¹⁵¹ Instead, they can utilize their existing distribution systems to insulate themselves from damages.¹⁵²

Id. at 969. It is submitted that this narrow "pass-on" analysis is irrelevant to the plaintiffs' claim that the defendant's conduct was designed to destroy the plaintiffs' businesses. For a discussion of the *Dart Drug* court's analysis of similar claims, see notes 70-73 and accompanying text *supra*.

146. The direct purchaser, an authorized dealer of the defendant, did not pursue any antitrust claims against Caterpillar. 713 F.2d at 968-69. In light of this fact, it is further suggested that the *Merican* case did not present the type of complex damage issues which the *Illinois Brick* court feared. The Supreme Court argued that "[p]ermitting the use of pass-on theory under § 4 . . . would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness." *Illinois Brick*, 431 U.S. at 737. Although the damage issues in *Merican* may be complicated, they are based on claims of discriminatory conduct, not pass-on theory.

147. See *Merican*, 713 F.2d at 971 (Higginbotham, J., dissenting) ("This is not a case where passed-on overcharges are so splintered that no indirect purchaser will be interested in pursuing relief; here, plaintiffs allege predatory destruction of their business—a complaint which only they may bring.”).

148. The duplicative recovery rationale was based on sympathy for the defendant rather than advancement of the goal of antitrust law enforcement. See *Illinois Brick*, 431 U.S. at 730-32. Some commentators had argued that it was better to accept the risk of multiple liability rather than permit injured parties to go uncompensated. See Comment, *supra* note 40, at 411. The Supreme Court specifically rejected this argument. See *Illinois Brick*, 431 U.S. at 731 n.11. The Court noted that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." *Id.* at 730 (emphasis added). For a discussion of the *Illinois Brick* Court's analysis of the multiple liability concern, see note 46 and accompanying text *supra*.

149. For a discussion of the applicability of the "litigative burden" analysis of *Illinois Brick* to *Merican*, see notes 47 & 50 and accompanying text *supra*.

150. See *Merican*, 713 F.2d at 971 (Higginbotham, J., dissenting) ("The anti-competitive conduct plaintiffs complain of cannot otherwise be policed.”).

151. Monopolization and attempts to monopolize are proscribed by § 2 of the Sherman Act. See 15 U.S.C. § 2 (1982). Restraints of trade are proscribed by § 1 of the Sherman Act. See 15 U.S.C. § 1 (1982). For the relevant text of § 1, see note 19 *supra*. For the pertinent text of § 2, see note 68 *supra*.

152. Of course, this result is predicated upon the assumption that the defendant's conduct does not fall within the "ownership or control" exception to *Illinois*

Such a result is neither consistent with the goals of sound antitrust policy nor required by the *Illinois Brick* decision.

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Brick. This exception is discussed at notes 61-64 and accompanying text *supra*. However, the Third Circuit has placed a high burden on plaintiffs who wish to demonstrate the applicability of this exception. *See Mid-West*, 596 F.2d at 589 (antitrust violator must dominate and control subsidiary to such an extent that the subsidiary is deemed to be an agent for the parent before the ownership or control exception is applicable). It follows from the *Mid-West* decision that the *Merican* plaintiff might not have recovered *even if* its seller was a subsidiary of the defendant, provided the "domination" element was not present. *See id.*